

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |                      |
|---|---|----------------------|
| In the Matter of                        | ) |                      |
|   | ) |                      |
| Schools and Libraries Universal Service | ) | CC Docket No. 02-6   |
| Support Mechanism                       | ) |                      |
|   | ) | File Nos. SLD-578905 |
| Request for Review of a Decision of the | ) | SLD-574902           |
| Universal Service Administrator by      | ) | SLD-635684           |
|   | ) |                      |
| Twin Rivers Unified School District     |   |                      |

**Consolidated Request for Review**

Rob J. Ball, RSBA  
Associate Superintendent-Business Support Services  
Twin Rivers Unified School district  
3222 Winona Way  
North Highlands, California 95660

February 8, 2013

### Summary

In this Request for Review, Twin Rivers Unified School District (“TRUSD”) seeks *de novo* review and reversal of six Commitment Adjustment letters (the “COMADs”) issued December 10, 2012 by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Corporation (“USAC”). The COMADs erroneously find TRUSD liable to return some \$1,100,262.94 in funding previously committed and disbursed through the schools and libraries universal service support mechanism, commonly known as “E-Rate.”

TRUSD was formed from four formerly independent school districts in California, located north of Sacramento. The six COMADs were issued based on the conduct of one of TRUSD’s predecessors, Rio Linda Union School District (“RLUSD” or “Rio Linda”). They allege three primary violations: (1) that, in three cases, Rio Linda did not have a contract in place before submitting its Form 471 for Funding Year 2007; (2) that, in two cases, Rio Linda did not use price as the primary factor in selecting its service provider; and (3) that, in five cases, Rio Linda did not wait the required 28 days before awarding a contract to its chosen provider.

In each case, TRUSD contends that these violations either did not occur, or were *de minimis* such that the Bureau should grant a waiver to excuse Rio Linda’s inadvertent errors. Regarding the purported violations of the Commission’s rules requiring a contract to be in place at the time the Form 470 is filed, in each case, Rio Linda had selected its provider and, at a minimum, some form of agreement was in place at the time the Form 470 was filed. In some cases, however, technical limitations of its purchasing and contract management software prevented Rio Linda from actually issuing a purchase order before the start of the school year on July 1. This technical limitations in no way affected Rio Linda’s ability actually to form a binding agreement, however, and should not form the basis of a COMAD. Further, Rio Linda’s actions were consistent with the requirements of

the California Public Contract Code, and the procedural processes for purchasing services from the CMAS state master contract, from which it purchased the services.

Regarding the alleged “price as a primary factor” violation, one of Rio Linda’s Requests for Proposals (“RFP”) gave cost a weight that, although it was the highest, was equal to the weight of another factor. In response to that RFP, however, Rio Linda received only one responsive bid, meaning that the weights assigned to the respective factors was irrelevant. As a result, and consistent with precedent, TRUSD requests a waiver of this rule.

Regarding the alleged “allowable contract date” violation, to the extent that these occurred, they involved, at most, a *de minimis* violation that occurred based on an inadvertent misunderstanding of the Commission’s rules in cases where either zero or one bidders responded to the Form 470. In these cases, Rio Linda appears to have selected its provider, at most, one to three days early. In three of these cases, involving the mere transition of existing E-Rate funded services from the CalNet state master contract to the CalNet II state master contract, it was not even required to file a Form 470 for that year, but did so out of an abundance of caution to ensure that it could make a smooth transition of its services. Again, as a result, and consistent with precedent, to the extent that the Bureau concludes that a violation occurred, TRUSD requests a waiver of this rule.

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| Universal Service Administrator by         | ) | SLD-635684           |
|  | ) |                      |
| Twin Rivers Unified School District, North | ) |                      |
| Highlands, California                      | ) |                      |

**Consolidated Request for Review of Twin Rivers Unified School District**

Twin Rivers Unified School District (“TRUSD”) hereby seeks *de novo* review and reversal of six Commitment Adjustments (the “COMADs”) issued December 10, 2012, by the Schools and Libraries Division (“SLD”) of the Universal Service Administrative Corporation (“USAC”).

The COMADs erroneously rescind SLD’s commitments of \$1,100,262.94 in properly disbursed funding from the Schools and Libraries Universal Service Support Mechanism (“E-Rate”) from Funding Years (“FY”) 2007 and 2008, including four funding commitments issued to one of TRUSD’s pre-unification predecessor schools, Rio Linda Union School District (“RLUSD” or “Rio Linda”). These funding commitments cover Telecommunications Services, Internet Access, Internal Connections, and Basic Maintenance for internal connections that are critically needed by TRUSD’s body of some 28,000 ethnically diverse urban students. Heightening the devastating impact, these COMADs follow literally years of in-depth investigation of TRUSD’s E-Rate compliance practices by SLD and its designated reviewers, from 2009 through 2012, during which SLD issued no additional funding commitments to TRUSD, causing severe financial strain.

## **I. Introduction and Background**

TRUSD was formed in November 2007, when voters in four school districts in areas north of Sacramento, CA, approved a ballot measure to combine into a new, unified K-12 district.<sup>1</sup> Effective July 1, 2008, TRUSD began serving an ethnically diverse, urban population of 28,000 students and their families who live within the boundaries of the four former school districts – Grant Joint Union High School District, North Sacramento School District, Del Paso Heights Elementary School District, and RLUSD, each of which ceased to exist as a separate public entity.

Since its formation, TRUSD has been beset by major challenges that accompany the blending of four separate districts into one. One recurring challenge has been that of doing more with substantially less. TRUSD acquired all of the responsibilities of the four former districts, but lost many of the staff, institutional knowledge and resources. There was little uniformity in the way the former districts kept records. With respect to business operations, TRUSD, through the very hard work of dedicated administration and staff, has effectively cleared many hurdles, streamlining processes and procedures in order to ensure compliance, and fulfill our vision to *"inspire each student to extraordinary achievement every day."*

TRUSD and all four of the former school districts have participated in the E-Rate program for many years, relying on funding discounts that help support communications and technology essential to education in this millennium. Located in an economically challenged area of inland California north of Sacramento, this funding is especially critical to ensure student access to information necessary for learning, to help them develop e-literacy skills, and to

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<sup>1</sup> See Exhibit 1.

thereby prevent the emergence of a "digital divide" between richer and poorer districts, one of the very purposes for which the program was first designed.

During 2009 – 2012, USAC halted all TRUSD's E-Rate funding, stopped normal PIA review, and began a three-year Special Compliance Review that required thousands of hours of employee time, pulling boxes of warehouse documentation going back nine years, and a search for information from former employees or consultants, some having lost their jobs as a result of the unification process. TRUSD faithfully responded to every USAC request, and produced every piece of information or documentation possible.

In light of the complexity of the TRUSD unification process, however, a “big picture” perspective is essential in order to reach a fair assessment of TRUSD’s compliance (and that of its four former districts) with the Commission’s E-Rate rules. There are not always simple “check box” answers to examiner questions or readily available documents from the thousands we have produced that explain our story. While TRUSD believes that it (and its four former districts) have complied in all material respects with the E-Rate rules, it is inevitable that some records may be misplaced, and some institutional knowledge lost, following the type of major integration effort required to launch TRUSD. As a result, while certain archived files, now going back seven years or more in some cases, may be incomplete, TRUSD believes that the record, taken as a whole, demonstrates its compliance with the E-Rate rules, and cannot support the COMADs issued by SLD.<sup>2</sup> Despite the significant challenges that confronted TRUSD

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<sup>2</sup> TRUSD has worked feverishly for the past several years trying to consolidate all of its E-rate documents that are stored in a warehouse. On December 10, 2012, USAC issued 10 COMADs to TRUSD, six of which are the subject of this appeal. TRUSD filed appeals for the other four COMADs with USAC, because it was able to either find the documentation that was the subject of those COMADs or because USAC had overseen information previously presented.

throughout the unification process, it has been responsible for the issuance of hundreds of POs since its unification in 2008 and has never been cited for any procurement issues with the exception of the E-rate program. As the prior districts have blended into TRUSD, so has it applied uniformity of procedures and best practices in business as well as education. In 2011 and 2012, TRUSD was the proud recipient of the distinguished Association of School Business Officials' Meritorious Budget Award.<sup>3</sup>

Furthermore, TRUSD faces fiscal challenges, such that the COMADs threaten to cause tremendous economic hardship. Notwithstanding news of improvement of the California budget, TRUSD is still in the midst of a great recession with limited California state funding. TRUSD serves neighborhoods that have been deeply blighted by the closure of McClellan Air Force Base in 2002, a facility that once supported thousands of families and businesses here. Growing crime in this area requires that we maintain a costly District police department in an effort to protect children and school property.

The return of over \$1.1 million, which was spent on E-Rate supported services to benefit students many years ago, would therefore harm the very fabric of TRUSD's educational mission that E-Rate is intended to support. Accordingly, to the extent that the Bureau believes that TRUSD or its predecessor RLUSD Union School District has committed a violation of the E-Rate rules, TRUSD hereby requests a waiver of those rules necessary to cure the violation. Repayment of over \$1.1 million will severely hurt TRUSD's service to children and families. It accomplishes nothing – TRUSD has cured past errors to the extent possible to do so – and is a further strain on resources.

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<sup>3</sup> Exhibit 26 (Copy of Certification of Award).



## II. The COMADs

On December 10, 2012, USAC issued six COMADs to Twin Rivers Unified School

District as set forth in the table below:

| Funding Year | FCC Form 470    | FCC Form 471 | FRN      | School District | Category         |
|--------------|-----------------|--------------|----------|-----------------|------------------|
| FY2007       | 676390000621541 | 578905       | 1618069  | RLUSD           | IC               |
| FY2007       | 720020000570136 | 574902       | 1589372  | RLUSD           | BMIC             |
| FY2007       | 720020000570136 | 578905       | 1636144  | RLUSD           | BMIC             |
| FY2008       | 334610000662776 | 635684       | 17758853 | RLUSD           | T (PacBell)      |
| FY2008       | 334610000662776 | 635684       | 1759054  | RLUSD           | T (AT&T)         |
| FY2008       | 334610000662776 | 635684       | 1758970  | RLUSD           | T (SBC Advanced) |

### A. FCC Form 471 578905, FRN 1618069 (Internal Connections)

On January 10, 2007, RLUSD Unified School District (“RLUSD”) posted a Form 470 No. 676390000621541 seeking a multi-year contract for internal connections beginning in Funding Year 2007.<sup>4</sup> One of the requirements of the RFP was that service providers were required to be qualified vendors under the California Multiple Award Schedule (“CMAS”). On that same date, RLUSD issued an RFP for these services.<sup>5</sup> Bid responses to the RFP were due on February 5, 2007. However, the allowable contract date per the FCC Form 470 was February 7, 2007.<sup>6</sup> RLUSD received only one bid response, namely from Marketware.<sup>7</sup> As was the practice

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<sup>4</sup> Exhibit 2 (RLUSD FCC Form 470 676390000621541).

<sup>5</sup> Exhibit 3 (RLUSD’s Response #1 to USAC, dated July 30, 2010).

<sup>6</sup> See Exhibit 3.

<sup>7</sup> Exhibit 4 (Declaration of Ruth Hall).

of RLUSD at that time,<sup>8</sup> and in accordance with California Public Contract Code, the issuance of a Purchase Order is an allowable contract vehicle pursuant to state law.<sup>9</sup> RLUSD selected the only bidder, Marketware, that was a qualified vendor under CMAS.<sup>10</sup> RLUSD executed a Purchase Order with Marketware on March 28, 2008 date.<sup>11</sup> All POs and E-rate procurement matters came before the RLUSD Board for discussion and approval.<sup>12</sup>

On December 4, 2007, USAC issued a positive Funding Commitment Decision Letter for this FRN. On December 10, 2012, USAC issued a Commitment Adjustment Letter,<sup>13</sup> stating:

During a review, it was determined that the applicant did not have a contract in place at the time of the submission of the Form 471. This determination was made based upon the applicants (sic) statement that it was the practice of the District at that time to inform the prevailing vendor that the Award of the contract was contingent upon funding from the USAC.” [USAC conjectured that] [i]t was implied and understood by the vendor that the filing of the 471 was the intent to proceed once funding was approved. FCC rules require applicants to have a valid contract as defined by the applicants (sic) state procurement laws and regulations at the time they submit the Form 471. USAC then concluded that “[s]ince the applicant was unable to demonstrate that they had a contract in place at the time of submission of the Form 471 that meets the state laws definition of a valid contract, the commitment has been rescinded in full . . . .”<sup>14</sup>

USAC further cited the following additional two bases for denial:

In addition, during a review, it was determined that the price of eligible products and services was not the primary factor in the vendor selection process. This determination was based on the evaluation criteria outlined in the RFP provided by the applicant. The document indicated that the Most Cost Effective Proposal and Client References both had a weighting of 30 percent as such price was not

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<sup>8</sup> *Id.*

<sup>9</sup> Exhibit 5 (California Public Contract Code).

<sup>10</sup> *See* Exh. 3.

<sup>11</sup> *See* Exh. 3.

<sup>12</sup> *See, e.g.* Exhibit 25 (Various Board Action Items for FY2007 and FY2008).

<sup>13</sup> Exhibit 6 (COMAD FCC Form 471 578905, FRN 1618069).

<sup>14</sup> *Id.*

the primary factor in your bid valuation. FCC rules require that applicants select the most cost-effective product and/or services offering with price being the primary factor. Applicants may take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. Since price was not the primary factor in the vendor selection process, the commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds.

In addition, during a review, you provided a copy for a Request for Proposal that was issued on 1/10/07. Your Form 470 was filed on 1/10/07 with an Allowable Contract Date of 2/7/07. According to Program rules, applicants must wait 28 days after their FCC Form 470 is posted to USAC's website or after public availability of their RFP, whichever is later, before selecting a vendor or executing a contract. The due date of your RFP was 2/5/07, which is less than 28 days after the issuance of the RFP. . . . Since you closed the bidding before the RFP was available for at least 28 days, you are not in compliance with FCC rules. Accordingly, the commitment for FRN 1618069 has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.

**B. FCC Form 471 574902 (FRN 1589372)**

On December 29, 2005, RLUSD posted an FCC Form 470 No. 720020000570136 seeking a multi-year contract for basic maintenance for internal connections beginning in Funding Year 2006.<sup>15</sup> The Allowable Contract Date was January 26, 2006. One of the requirements of the RFP was that service providers were required to be qualified vendors under the CMAS state master contract. On that same date, RLUSD issued an RFP for the services referred to in its Form 470. Bid responses to the RFP were due on February 6, 2006. RLUSD received two bid responses, one from Marketware Technologies ("Marketware") and the other from Network Management Corporation ("NMC").<sup>16</sup> Bids were evaluated and the totals scored on the attached bid evaluation sheet.<sup>17</sup> NMC's bid came in \$400 higher than Marketware's, and was missing essential licenses. RLUSD awarded the contract to Marketware prior to certifying

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<sup>15</sup> Exhibit 7 (FCC Form 470 No. 720020000570136).

<sup>16</sup> Exhibit 8 (RLUSD Response #1 FRN 1589372).

<sup>17</sup> Exhibit 9 – (MktwareNMCBidEvalSheet).

and filing its FCC Form 471 # 574902.<sup>18</sup> Both vendors were present at bid opening when Marketware was awarded the bid. No bid protest was filed.<sup>19</sup>

As was the practice of RLUSD at that time, and in accordance with California Public State Contract Code, RLUSD was only required to issue Purchase Orders (POs) after it selected a qualified vendor from CMAS.<sup>20</sup> POs (Contracts) were created at the start of each Funding Year (July 1) for basic maintenance and after the issuance of positive FCDLs for other services.<sup>21</sup> In 2006, RLUSD's software system did not provide an automatic "rollover" of Purchase Orders from one school year to another (*i.e.* past June 30th), so POs for each Funding Year had to be created on or after July 1<sup>st</sup>. School district offices were closed for business during the month of July in 2006, and resumed in early August. RLUSD executed its Purchase Order with Marketware on Aug. 14, 2006. On February 5, 2007, RLUSD submitted its Form 471 for the upcoming FY2007 and, on January 22, 2008, USAC issued a positive FCDL, attached hereto.

Subsequently, USAC conducted an extensive review and requested additional information. On June 30, 2011, TRUSD provided its response to USAC and explained that it complied with its standard practice of issuing a purchase order that contractually binds RLUSD.<sup>22</sup> On December 10, 2012, USAC issued a Commitment Decision Letter, stating, “[d]uring a review, it was determined that the applicant did not have a contract in place at the time of the submission of the Form 471. This determination was made based upon the applicants (sic) statement that it was the practice of the District at that time to inform the prevailing vendor

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<sup>18</sup> See Exhibit 4.

<sup>19</sup> See Exhibit 4.

<sup>20</sup> See Exhibit 5.

<sup>21</sup> See Exhibit 4.

<sup>22</sup> Exhibit 10 - Response #7 Letter & Attachments, RLUSD FRN 1589372.

that the Award of the contract was contingent upon funding from the SLD.”<sup>23</sup> USAC then conjectured that “[i]t was implied and understood by the vendor that the filing of the 471 was the intent to proceed once funding was approved.”<sup>24</sup> USAC further stated that the FCC rules require applicants to have a valid contract as defined by the applicants (sic) state procurement laws and regulations at the time they submit the Form 471.”<sup>25</sup> USAC then concluded that “[s]ince the applicant was unable to demonstrate that they had a contract in place at the time of submission of the Form 471 that meets the state laws definition of a valid contract, the commitment has been rescinded in full . . . .”<sup>26</sup>

As set forth above, RLUSD issued an RFP. The RFP requires the bidders to make certain certifications and execute the bid response, which becomes binding upon the service provider and school district. Contracts are a matter of state law. The process and procedure that RLUSD followed adhered to state law requirements.

**C. FCC Form 471 578905, FRN 1636144 (BMIC)**

On January 10, 2007, RLUSD Unified School District (“RLUSD”) posted a Form 470 No. 676390000621541 seeking a multi-year contract for internal connections beginning in Funding Year 2007.<sup>27</sup> One of the requirements of the RFP was that service providers were required to be qualified vendors under CMAS. On that same date, RLUSD issued an RFP for these services.<sup>28</sup> Bid responses to the RFP were due on February 5, 2007. However, the

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<sup>23</sup> Exhibit 11 - FY2007 Rio Linda COMAD FRN1589372 (Marketware).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Exhibit 2 (RLUSD FCC Form 470 676390000621541).

<sup>28</sup> Exhibit 3 (RLUSD’s Response #1 to USAC, dated July 30, 2010).

allowable contract date per the FCC Form 470 was February 7, 2007.<sup>29</sup> RLUSD received only one bid response, namely from Marketware.<sup>30</sup> As was the practice of RLUSD at that time,<sup>31</sup> and in accordance with California Public Contract Code, the issuance of a Purchase Order is an allowable contract vehicle pursuant to state law.<sup>32</sup> RLUSD selected the only bidder, Marketware, that was a qualified vendor under CMAS.<sup>33</sup> RLUSD executed a Purchase Order with Marketware on March 28, 2008 date.<sup>34</sup>

During PIA Review, SLD noticed that the request for internal connections contained a basic maintenance service component. SLD notified applicant that it was splitting the FRN and creating a new FRN for the Basic Maintenance for internal connections in order to conduct an independent review.<sup>35</sup> SLD assigned a new FRN 1636144 to these services and assigned this new FRN to RLUSD's originating FCC Form 470 # 720020000570136, because that FCC Form 470 posted for BMIC only and its RFP allowed for a multi-year contract.<sup>36</sup> TRUSD used the February 7, 2007 as the allowable contract date based upon the administrative split of the FRNs and the signed contract for these services with Marketware. Given that SLD had spent considerable time assisting TRUSD to correct this administrative error by splitting the FRN and assigning it to a different FCC Form 470, and subsequently conducting a full PIA review that let

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<sup>29</sup> See Exhibit 3.

<sup>30</sup> Exhibit 4 (Declaration of Ruth Hall).

<sup>31</sup> *Id.*

<sup>32</sup> Exhibit 5 (California Public Contract Code).

<sup>33</sup> See Exhibit 3.

<sup>34</sup> Exhibit 12 - RLUSD Response #1 FRN 1636144

<sup>35</sup> Exhibit 13 - FCDL AN 578905 Both FRNs.

<sup>36</sup> Exhibit 2.

to the issuance of a positive FCDL on December 4, 2007 for this new FRN 1636144,<sup>37</sup> TRUSD believes that it complied with all the appropriate requirements at SLD's direction and with SLD's assistance.

Subsequently, SLD conducted an extensive review and requested additional information. On July 30, 2010, TRUSD provided its response to SLD and explained that it complied with its standard practice of issuing a purchase order that contractually binds RLUSD.<sup>38</sup> RLUSD's software system did not provide an automatic "rollover" of Purchase Orders from one school year to another (i.e. past June 30), so POs for each Funding Year had to be created July 1 or later.

In addition, it provided copies of the binding purchase orders and bid responses.<sup>39</sup> On September 16, 2010, pursuant to ongoing inquiry by the Special Compliance Review Team, TRUSD reiterated its prior explanations that during the PIA review for the Digital Media System, RLUSD was advised to remove the SmartNet costs [BMIC] from the original FRN # 1618069, because the maintenance part of this project was not allowed in an Internal Connections FRN.<sup>40</sup> The maintenance contract that was extended from the FY2006 was the same service provider and since the pricing was established by the Digital Media System bid, the SmartNet maintenance was removed from the FRN # 1618069 and added to the FRN#1636144. In a nutshell, the SmartNet Maintenance for portion of the Digital Media System was established through the RFP in FY2007, but was submitted as an addition to the multi-year contract established in FY2006. Further the multi-year maintenance contract was signed prior to the

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<sup>37</sup> Exhibit 12; *see also* Exhibit 4.

<sup>38</sup> Exhibit 10.

<sup>39</sup> Exhibit 12.

<sup>40</sup> Exhibit 15 (RLUSD Response to USAC).

submission of the Form 471. The renewal of the maintenance contract was 1/15/07, but the addition of the SmartNet maintenance contract was 2/7/07.

On November 17, 2010, TRUSD provided further responses to SLD's inquiry regarding FRN 1636144.<sup>41</sup> Again, TRUSD clarified that SLD had required that RLUSD split its FRN to net out the BMIC services from the internal connections FRN. Clearly, RLUSD had initially erred by citing to the wrong originating FCC Form 470 for the BMIC services and SLD assisted RLUSD in correcting this ministerial error.

On December 10, 2012, SLD issued a Commitment Adjustment Letter, stating:

During a review, it was determined that the applicant did not have a contract in place at the time of the submission of the Form 471. This determination was made based upon the applicants (sic) statement that it was the practice of the District at that time to inform the prevailing vendor that the Award of the contract was contingent upon funding from the SLD."<sup>42</sup>

SLD then conjectured that "[i]t was implied and understood by the vendor that the filing of the 471 was the intent to proceed once funding was approved."<sup>43</sup> SLD further stated that the FCC rules require applicants to have a valid contract as defined by the applicants (sic) state procurement laws and regulations at the time they submit the Form 471."<sup>44</sup> SLD then concluded that "[s]ince the applicant was unable to demonstrate that they had a contract in place at the time of submission of the Form 471 that meets the state laws definition of a valid contract, the commitment has been rescinded in full . . . ."<sup>45</sup>

SLD further cited the following three additional bases for its denial:

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<sup>41</sup> Exhibit 14.

<sup>42</sup> Exhibit 16.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*



In addition, during a review, it was determined that your Form 470 did not include the services for which you sought funding in your Form 471 application, which is a violation of the FCC's competitive bidding rules. The applicant indicated that the FCC Form 470 # 676390000621541 established the bidding for the Smartnet services requested in this FRN. However the applicant failed to post for any Basic Maintenance of Internal Connections services. FCC rules require that, except under limited circumstances, all eligible schools and libraries shall seek competitive bids for all services eligible for support. Since the services for which you sought funding were not properly posted to the web site for competitive bidding, the commitment has been rescinded in full . . . .

In addition, during a review, it was determined that the price of eligible products and services was not the primary factor in the vendor selection process. This determination was based on the evaluation criteria outlined in the RFP provided by the applicant. The document indicated that the Most Cost Effective Proposal and Client References both had a weighting of 30 percent as such price was not the primary factor in your bid valuation. FCC rules require that applicants select the most cost-effective product and/or services offering with price being the primary factor. Applicants may take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. Since price was not the primary factor in the vendor selection process, the commitment has been rescinded in full and SLD will seek recovery of any improperly disbursed funds.

In addition, during a review, you provided a copy for a Request for Proposal that was issued on 1/10/07. Your Form 470 was filed on 1/10/07 with an Allowable Contract Date of 2/7/07. According to Program rules, applicants must wait 28 days after their FCC Form 470 is posted to SLD's website or after public availability of their RFP, whichever is later, before selecting a vendor or executing a contract. The due date of your RFP was 2/5/07, which is less than 28 days after the issuance of the RFP. . . . Since you closed the bidding before the RFP was available for at least 28 days, you are not in compliance with FCC rules. Accordingly, the commitment for FRN 1636144 has been rescinded in full and SLD will seek recovery of any improperly disbursed funds from the applicant.<sup>46</sup>

**D. FCC Form 471 635684, FRN 1758853 (Telecom-CalNet II MSA)**

On January 1, 2008, RLUSD posted a Form 470 (No. 334610000662776) seeking telecommunication services from the California State CalNet II Master Services Agreement

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<sup>46</sup> *Id.*

(“CalNet II”).<sup>47</sup> RLUSD posted this FCC Form 470, because it wanted to be certain that there would be no discontinuation of services from the CalNet State Master Contract that was set to expire in the middle of the funding year in December 2008.<sup>48</sup> Specifically, RLUSD explained in Block 13b of its Form 470 that “[t]he District would like to move from the current State CalNet Contract that ends December 2008, to the new CalNet II Contract for phone, long distance, and data services.”<sup>49</sup> The FCC Form 470 identified the Allowable Contract Date to be February 7, 2008.<sup>50</sup> RLUSD did not issue an RFP for these services.<sup>51</sup> No bids were received.<sup>52</sup> RLUSD’s continued to purchase Telecommunications Services from the California State Master Contract, CalNet II. This State Master Contract was effective January 30, 2007 for a five-year period. RLUSD executed the perfunctory CalNet II contract on February 4, 2007. SBC signed on February 6, 2007, and the authorized state official approved the contract on February 7, 2007;<sup>53</sup> the same date that the FCC Form 471 635684 was submitted and certified. On April 14, 2009, USAC issued a positive FCDL.<sup>54</sup>

Subsequently, USAC conducted an extensive review and requested additional information. TRUSD provided its response to USAC and explained that it (1) only filed an FCC Form 470 and no RFP, as set forth on its FCC Form 470, (2) it did not receive any bids,

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<sup>47</sup> Exhibit 17 (FY2008 FCC Form 470)

<sup>48</sup> See Exhibit 4.

<sup>49</sup> See Exhibit 17.

<sup>50</sup> *Id.*

<sup>51</sup> Exhibit 18 - RLUSD Response to USAC for FRN 175883.

<sup>52</sup> See Exhibit 4.

<sup>53</sup> Exhibit 18.

<sup>54</sup> Exhibit 19 - FY2008 FCC Form 471 No. 635684.

and (3) it purchased telecom services from the California State Master Contract CalNet II.<sup>55</sup> In addition, TRUSD provided all of the pertinent documentation to USAC evidencing these facts.

On December 10, 2012, USAC issued a Commitment Adjustment Letter, stating,

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During a review, it was determined that the applicant signed a contract with the service provider prior to the expiration of 28-day posting period. FCC rules require that, except under limited circumstances, all Forms 470 received be posted on the USAC web site for 28 days, and that applicants carefully consider all bids received before selecting a service provider, entering into an agreement or signing a contract, and signing and submitting a Form 471. In the Receipt Notification Letter, USAC notified the applicant that the earliest date upon which they could sign a contract or enter into an agreement (allowable Contract Date) was February 7, 2008. Based on the documentation provided, (Telecommunications Services Request), it appears that the service provider was selected on February 4, 2008. Since the service provider was selected prior to the required 28-day posting period, the commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.<sup>56</sup>

**E. FCC Form 471 635684, FRN 1759054 (Telecom-CalNet II MSA)**

On January 1, 2008, RLUSD posted a Form 470 No. 334610000662776 seeking Telecommunication Services from the California State Master Services Agreement.<sup>57</sup> RLUSD posted this FCC Form 470, because it wanted to make sure that there would be no discontinuation of services from the CalNet State Master Contract that was set to expire in the middle of the funding year in December 2008. Specifically, RLUSD explained in Block 13b of its Form 470 that “[t]he District would like to move from the current State CalNet Contract that ends December 2008, to the new CalNet II Contract for phone, long distance, and data

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<sup>55</sup> Exhibit 18.

<sup>56</sup> Exhibit 20 - TRUSD COMAD FRN1758853 (12-10-2012 Pac Bell).

<sup>57</sup> Exhibit 17.

services.”<sup>58</sup> The FCC Form 470 identified the Allowable Contract Date to be February 7, 2008. RLUSD did not issue an RFP for these services. No bids were received.<sup>59</sup> RLUSD’s continued to purchase telecom services from the California State Master Contract, CalNet II. This State Master Contract was effective January 30, 2007 for a five-year period. RLUSD executed the CalNet II contract on February 4, 2007. SBC signed on February 6, 2007, and the authorized state official approved the contract on February 7, 2007;<sup>60</sup> the same date that the FCC Form 471 635684 was submitted and certified.<sup>61</sup> On April 14, 2009, USAC issued a positive FCDL.

Subsequently, USAC conducted an extensive review and requested additional information. TRUSD provided its response to USAC and explained that it (1) only filed an FCC Form 470 and no RFP, as set forth on its FCC Form 470, (2) it did not receive any bids, and (3) it purchased telecom services from the California State Master Contract CalNet II.<sup>62</sup> In addition, TRUSD provided all of the pertinent documentation to USAC evidencing these facts.

On December 10, 2012, USAC issued a Commitment Adjustment Letter, stating,

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During a review, it was determined that the applicant signed a contract with the service provider prior to the expiration of 28-day posting period. FCC rules require that, except under limited circumstances, all Forms 470 received be posted on the USAC web site for 28 days, and that applicants carefully consider all bids received before selecting a service provider, entering into an agreement or signing a contract, and signing and submitting a Form 471. In the Receipt Notification Letter, USAC notified the applicant that the earliest date upon which they could sign a contract or enter into an agreement (allowable Contract Date) was February 7, 2008. Based on the documentation provided, (Telecommunications Services Request), it appears that

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<sup>58</sup> *Id.*

<sup>59</sup> Exhibit 21 - RLUSD Response to USAC for FRN 1759054

<sup>60</sup> *Id.*; *see also* Exhibit 4.

<sup>61</sup> Exhibit 19.

<sup>62</sup> Exhibit 21.

the service provider was selected on February 4, 2008. Since the service provider was selected prior to the required 28-day posting period, the commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.<sup>63</sup>

**F. FCC Form 471 635684, FRN 1758970 (Telecom-CalNet II MSA)**

On January 1, 2008, RLUSD posted a Form 470 No. 334610000662776 seeking Telecommunication Services from the California State Master Services Agreement.<sup>64</sup> RLUSD posted this FCC Form 470, because it wanted to be certain that would be no discontinuation of services from the CalNet State Master Contract that was set to expire in the middle of the funding year in December 2008. Specifically, RLUSD explained in Block 13b of its Form 470 that “[t]he District would like to move from the current State CalNet Contract that ends December 2008, to the new CalNet II Contract for phone, long distance, and data services.”<sup>65</sup> The FCC Form 470 identified the Allowable Contract Date to be February 7, 2008. RLUSD did not issue an RFP for these services.<sup>66</sup> No bids were received.<sup>67</sup> RLUSD’s continued to purchase telecom services from the California State Master Contract, CalNet II. This State Master Contract was effective January 30, 2007 for a five year period. RLUSD executed the perfunctory CalNet II contract on February 4, 2007. SBC signed on February 6, 2007, and the authorized state official approved the contract on February 7, 2007;<sup>68</sup> the same date that the FCC

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<sup>63</sup> Exhibit 22 - FY2008 COMAD FRN1759054

<sup>64</sup> Exhibit 17 - FCC Form 470 (FY2008)

<sup>65</sup> *Id.*

<sup>66</sup> Exhibit 23- RLUSD Response to USAC FRN 1758970.

<sup>67</sup> *Id.*; *see also* Exhibit 4.

<sup>68</sup> CalNet II Contract.

Form 471 635684 was submitted and certified.<sup>69</sup> On April 14, 2009, USAC issued a positive FCDL.

Subsequently, USAC conducted an extensive review and requested additional information. TRUSD provided its response to USAC and explained that it (1) only filed an FCC Form 470 and no RFP, as set forth on its FCC Form 470, (2) it did not receive any bids, and (3) it purchased telecom services from the California State Master Contract CalNet II.<sup>70</sup> In addition, TRUSD provided all of the pertinent documentation to USAC evidencing these facts.

On December 10, 2012, USAC issued a Commitment Adjustment Letter, stating,

After a thorough investigation, it has been determined that this funding commitment must be rescinded in full. During a review, it was determined that the applicant signed a contract with the service provider prior to the expiration of 28-day posting period. FCC rules require that, except under limited circumstances, all Forms 470 received be posted on the USAC web site for 28 days, and that applicants carefully consider all bids received before selecting a service provider, entering into an agreement or signing a contract, and signing and submitting a Form 471. In the Receipt Notification Letter, USAC notified the applicant that the earliest date upon which they could sign a contract or enter into an agreement (allowable Contract Date) was February 7, 2008. Based on the documentation provided, (Telecommunications Services Request), it appears that the service provider was selected on February 4, 2008. Since the service provider was selected prior to the required 28-day posting period, the commitment has been rescinded in full and USAC will seek recovery of any improperly disbursed funds from the applicant.<sup>71</sup>

This Request for Review ensued.

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<sup>69</sup> Exhibit 19.

<sup>70</sup> Exhibit 23.

<sup>71</sup> Exhibit 24 - FY2008 TRUSD COMAD FRN1758970 (SBC Advanced)

### **III. Argument**

#### **A. RLUSD Had Agreements in Place before Submitting Its Form 471 Funding Requests (FRN 1589372, 1618069, 1636144)**

The Commission's rules provide that a school seeking E-Rate funding for eligible services "shall, upon signing a contract for eligible services, submit a completed FCC Form 471 to [USAC]."<sup>72</sup> In each case, a review of RLUSD's records reveals that it had in place an agreement with its chosen vendor before submitting its Form 471 sufficient to meet the requirement of this rule.

In the case of **FRN 1618069**, RLUSD submitted its Form 471 on February 7, 2007, which was also the Allowable Contract Date established by the underlying Form 470. In response to the underlying Form 470 and Request for Proposals, both issued on January 10, 2007, RLUSD received only one bid, from Marketware. Once RLUSD evaluated and selected this bid, a binding commitment was formed at that time. Once selected, the Marketware bid becomes the contract, as evidenced by the cover sheet of the bid itself, which is styled as "Contract Services for RLUSD Union School District," and states that Marketware "proposes and agrees to furnish any and all required services as requested under this contract by the RLUSD Union School District."<sup>73</sup> Thus, this bid became binding against Marketware when submitted to RLUSD on February 5, 2007, and binding against RLUSD when selected, both of which occurred before the Form 471 was submitted on February 7, 2007.

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<sup>72</sup> 47 C.F.R. § 54.504(c) (2007). Unless otherwise noted, citations to the Commission's rules in this Request for Review refer to the rules as they were in effect during the procurement cycle and Funding Year at issue in the COMAD being discussed, *i.e.*, FY2007 or FY2008, as the case may be.

<sup>73</sup> See Exhibit 3.

While limitations of its purchasing and contract management software prevented RLUSD from issuing a Purchase Order for the upcoming school year at that time, this technical limitation should in no way be construed to undermine the validity of the selection process that took place prior to February 7, 2007. Once that critical vendor selection process was complete, the issuance of the Purchase Order should be viewed as a ministerial act intended to implement the agreement previously formed during the procurement process. As was Rio Linda's practice at that time, and in accordance with California Public State Contract Code, Rio Linda was only required to issue Purchase Orders (POs) after it selected a qualified vendor from CMAS.<sup>74</sup> As the Bureau has found, "[c]urrent USAC guidance does not second-guess the validity of a contract . . . so long as the applicable state and/or local contract law requirements for establishing a valid, binding contract are met."<sup>75</sup> Here, RLUSD's actions were consistent with the requirements of the California Public Contract Code, and the procedural processes for purchasing services from the CMAS state master contract.

To the extent that the Commission believes that the bid/acceptance process did not, for any reason, produce a "contract for eligible services" that fully meets the requirements of Section 54.504(c), RLUSD hereby requests a waiver of those requirements. The Bureau may grant a waiver, if it finds that special circumstances justify a waiver, and the waiver would be in the public interest. Existing Commission precedent, chiefly *Adams County* and its progeny, establishes that RLUSD meets this standard. Under *Adams County* and its progeny, it is well

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<sup>74</sup> See Exhibit 5.

<sup>75</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Request for Review of a Decision of the Universal Service Administrator by Hillsboro Independent School District, Richmond, Texas, DA 08-2366, 23 FCC Rcd 15424 (Wir. Comp. Bur. 2008), at ¶ 8.



established that E-Rate applicants with “some form of an agreement with their service providers before submitting their FCC Forms 471,” may receive a waiver of the stricter requirements of Section 54.504(c), in order to preserve E-Rate funding.<sup>76</sup> As indicated above, Marketware was the only bidder, and it executed a bid that became binding on it, if selected. RLUSD did, in fact, select Marketware’s bid and file a funding request for the services it proposed, thereby evincing its clear intent to proceed with the Marketware contract. Special circumstances, in the form of the technical limitations of RLUSD’s purchasing and contract management system, prevented RLUSD from issuing a Purchase Order for the upcoming school year in February 2007, but RLUSD thereafter did in fact proceed with the issuance of the purchase order, once it was technically able to do so.

Further, a waiver would clearly serve the public interest. RLUSD’s successor, TRUSD, serves a large, culturally diverse, economically challenged student body that relies on critical E-Rate funding to gain essential access to telecommunication services, Internet access, and internal connections. These IT resources are increasingly essential to enable TRUSD to meet its 21<sup>st</sup> century educational mission. The funding at issue was long ago spent by TRUSD’s predecessor on services delivered during FY2007. By rescinding its funding commitment, USAC will severely impact the budget for services to today’s students, causing grave harm to their educational opportunities. Moreover, because RLUSD was only one of four school districts that have now combined, this harm will fall, in many cases, on students from outside the former RLUSD boundaries, a clearly inequitable result.

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<sup>76</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Requests for Waiver of the Decision of the Universal Service Administrator by Adams County School District 14, Commerce City, Colorado, FCC 07-35, 22 FCC Rcd 6019 (2007), at ¶ 9.

In the case of **FRN 1589372**, in FY 2007, RLUSD had in place a valid multi-year contract with Marketware that had been put in place for FY2006. In that establishing Form 470, RLUSD clearly stated, “[t]he District is seeking a mult[i]-year contract to cover the basic maintenance of all e-rate eligible items. E-rate sites may vary based on discount rates per year. Contract pricing will insure a stable maintenance schedule.”<sup>77</sup> Similarly, the Request for Proposals stated, “RLUSD Union School District may elect to purchase services proposed in any quantity anytime after the award of the contract through June 30, 2009.”<sup>78</sup>

In response to this Form 470, RLUSD received two bids, from Marketware and NMC. Before submitting its initial Form 471, RLUSD evaluated each of the two bids it had received and Marketware emerged as the clear winner. The other bidder, NMC, not only offered a price higher than Marketware’s, but also lacked key licenses. On that basis alone, RLUSD could have chosen to eliminate NMC from consideration, as the underlying Request for Proposals clearly stated that bidders must “provide at a minimum all requested information in the quote document” and that, “Any portion not included will be cause for elimination from the proposal process.”<sup>79</sup>

Even though NMC was not eliminated at that stage, the bid sheet, prepared on February 6, 2006, prior to submitting the Form 471, clearly indicates that Marketware emerged as the bidder with the higher score, and thus provides evidence of RLUSD’s decision to award the contract to Marketware. A binding commitment was therefore formed at that time. Once selected, the Marketware bid becomes the contract, as evidenced by the cover sheet of the bid itself, which is styled as “Contract Services Proposal,” and states that Marketware “proposes and

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<sup>77</sup> Form 470 No. 720020000570136, Block 13b.

<sup>78</sup> “E-Rate Basic Maintenance,” Bid # RLUSD-Y9-01, at 2.

<sup>79</sup> RLUSD Notice to Bidders, “Y9-01 E-Rate Basic Maintenance,” attached as Exhibit 8.

agrees to furnish any and all required maintenance agreement services as requested under this contract by the RLUSD UNION School District.”<sup>80</sup>

While limitations of its purchasing and contract management software prevented RLUSD from issuing a Purchase Order for the upcoming school year at that time, this technical limitation should in no way be construed to undermine the validity of the selection process that took place prior to February 7, 2007. Once that critical vendor selection process was complete, the issuance of the Purchase Order should be viewed as a ministerial act. Once issuance of the Purchase Order became possible following the arrival of the key July 1, 2007 date, and the return of the District Office staff following its summer hiatus, the Purchase Order was issued reasonably promptly on August 14, 2006. Furthermore, as indicated above, under the California Public State Contract Code, Rio Linda was only required to issue POs after it selected a qualified vendor from CMAS.<sup>81</sup>

The parties subsequently entered into an extension of this contract, as clearly contemplated by the establishing Form 470, the Request for Proposals, and the bid documents. Specifically, a contract extension was signed by Marketware on January 6, 2007, and by RLUSD on January 9, 2007, for the then-upcoming FY2007.<sup>82</sup> Both of these dates were well in advance of RLUSD’s filing of its Form 471 for the then-approaching FY2007, on February 5, 2007 (Form 471 #574902).

As with the above, and for substantially the same reasons, consistent with the *Adams County* line of precedent, TRUSD hereby requests a waiver of Section 54.504(c) should the

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<sup>80</sup> See Exhibit 8, Marketware Contract Services Proposal).

<sup>81</sup> See Exhibit 5.

<sup>82</sup> See Exhibit 8, Marketware eRate Basic Maintenance – Contract Extension.

Bureau conclude that, for some reason, the contract extension did not fully meet the requirements of that rule.

With respect to **FRN 1636144**, again, RLUSD met the requirement of Section 54.504(c) to have in place a valid contract prior to filing its Form 471. RLUSD filed this funding request, seeking support for BMIC, in Form 471 # 578905, originally selecting its FY2007 Form 470 # 676390000621541 as its establishing Form 470. With assistance from the USAC staff, after they pointed out that the FY2007 Form 470 had not sought support for BMIC, this funding request was split off and reassigned to RLUSD's FY2006 Form 470 # 720020000570136, pursuant to which RLUSD was already under contract to Marketware for BMIC services, pursuant to FRN 1589372, discussed immediately above. Once Marketware's bid, submitted in response to RLUSD Request for Proposals, "eRate Bid Cisco Digital Media System, Bid # RLUSD-Y10-01,"<sup>83</sup> was accepted on February 7, 2007, therefore, these BMIC services were folded in to the preexisting BMIC contract with Marketware executed in 2006.

As a result, for the same reasons as were discussed in connection with FRN 1618069, from which FRN 1636144 was created, it is clear that a valid contract was in place before the Form 471 was filed. Again, and for substantially the same reasons, consistent with the *Adams County* line of precedent, TRUSD hereby requests a waiver of Section 54.504(c) should the Bureau conclude that, for some reason, the contract extension did not fully meet the requirements of that rule.

The separate assertion in the COMAD for this funding request that the establishing Form 470 for this funding request "did not include the service(s) for which you sought funding in your Form 471 application," utterly lacks a foundation. The COMAD, inexplicably, resurrects the

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<sup>83</sup> See Exhibit 12.

FY2007 Form 470 #676390000621541 as the establishing Form 470. As can readily be seen on the Form 471 # 578905 itself, and on the original FCDL, RLUSD had already corrected this ministerial error during the initial review process before the funding request issued *and with considerable assistance, guidance, and involvement from the USAC staff*. The error has been corrected, to make the FY2006 Form 470 # 720020000570136, an arrangement that was suggested by the USAC staff itself and implemented by RLUSD with their assistance.

**B. A Waiver of the Requirement to Use Price as the Primary Factor for Any Funding Request (FRN 1618069, 1636144)**

Among other requirements, the Commission's rules state that, in evaluating and selecting bids for E-Rate funded services, the "the bid selected will be for the most cost-effective service or equipment offering, with price being the primary factor,"<sup>84</sup> As interpreted by the Bureau, when evaluating bids, "applicants must have a separate 'cost category' and that category must be given more weight than any other single factor."<sup>85</sup>

Two of the COMADs, for FRN Nos. 1618069 and 1636144, assert that RLUSD violated this requirement. They relate to the same Request for Proposals, Bid # RLUSD-Y10-01, in which issued by RLUSD for FY2007, containing the following language establishing bid criteria:

Evaluation Criteria:

1. Most Cost Effective Proposal for Services Requested, including unit prices, labor rates, travel/trip charges, etc. (30%)
2. Technical approach including experience and background qualifications. (20%)

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<sup>84</sup> 47 C.F.R. § 54.504(b)(2)(vii) (2007).

<sup>85</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Requests for Review of Decisions of the Universal Service Administrator by Allendale County School District, Cedar Mountain, North Carolina, *et al.*, DA 11-723 (Wir. Comp. Bur. 2011), at ¶ 4 ("Allendale").

3. Client references. (30%)
4. Proposal preparation and responsiveness to the project requirements (20%)<sup>86</sup>

While this Request for Proposals, therefore, established a separate cost category with the highest weighting, it was weighted the same as another factor, client references.

RLUSD agrees that, as written, these evaluation criteria have the potential to cause a violation of the Commission's "price as the primary factor" rule. Nevertheless, no such violation occurred in this case. In response to this Request for Proposals, as discussed above, RLUSD received *only one bid*. Therefore, the precise weighting of the evaluation criteria, by definition, could have no effect on the outcome. Indeed, only if its bid were to have been disqualified for some reason could Marketware have not emerged as the winner.

In similar circumstances, the Bureau has found it appropriate to waive the requirement of Section 54.504(c)(2)(vii) that price be given a higher weight than any other factor.<sup>87</sup> Where there is only one responsive bidder, the Bureau has found that, "the responsive bid necessarily offered the lowest price" and "consistent with the policy goals underlying the Commission's competitive bidding rules, the least expensive responsive service offering was ultimately selected by . . . petitioners that failed to assign the highest weight to the price category."<sup>88</sup> The competitive bidding process in such circumstances "resulted in the selection of the most cost-effective service offering," regardless of the underlying weighting of the selection factors.<sup>89</sup>

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<sup>86</sup> See Exhibit 12.

<sup>87</sup> *Allendale*, at ¶ 16.

<sup>88</sup> *Id.*, at ¶ 10.

<sup>89</sup> *Id.*, at ¶ 12.

As in *Allendale*, a waiver is justified here because the Marketware bid, as the only responsive bid RLUSD received, necessarily offered the most cost effective service offering and the lowest price.

**C. RLUSD Inadvertently Filed an FCC Form 470 and Requests a Waiver of the Allowable Contract Date Requirements because Any Violations Were *De Minimis* (FRN 1758853, 1759054, 1758970, 1636144, 1618069)**

The Commission's rules require applicants to wait a minimum of 28 days after issuing a Form 470 and Request for Proposals, if used, before awarding a contract to any bidder.<sup>90</sup> Here, with respect to **FRN Nos. 1758853, 1759054, and 1758970**, Rio Linda purchased Telecommunications Services from the California State Master Services Agreement state master contract. This Form 470 appears to have been unnecessary but, out an overabundance of caution, and to ensure that Rio Linda would not experience a break in service following the CalNet MSA due to expire in December 2008, and to take advantage of the CalNet II Master State Contract that would remain in effect throughout FY2008, RLUSD posted this Form 470, where it clearly made its intent known in Block 13b. As set forth in the facts above, no bids were received, and RLUSD proceeded as it had intended to purchase its services form the CalNet II contract in order to avert any potential disruption to Telecommunications Services to the school district.

As reflected in the COMADs, despite the fact that RLUSD was not required to post a Form 470 in these circumstances at all, RLUSD appears inadvertently to have committed minor,

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<sup>90</sup> 47 C.F.R. § 54.503(b)(4) (2007) ("After posting on the Administrator's website an eligible school's, library's, or consortium's FCC Form 470, the Administrator shall send confirmation of the posting to the entity requesting service. That entity shall then wait at least four weeks from the date on which its description of services is posted on the Administrator's website before making commitments with the selected providers of services.").

*de minimis*, inadvertent violations of the Commission's rules by failing to wait the full 28 days before signing its new CalNet II contract.

Given that the entire process was unnecessary at best, TRUSD believes that the COMAD should be dismissed. Nevertheless, to the extent that Rio Linda's actions represent a violation of Section 54.503(b)(4), TRUSD hereby requests a waiver of that rule. The violations were inadvertent, and had no impact on the competitive bidding process. As the Commission has explained in granting previous requests for waiver of this rule:

We find that Petitioners' errors related to the competitive bidding process do not warrant a complete rejection of their applications. We have examined the facts of each of these appeals and found that a waiver is warranted based on the circumstances presented and based on the facts that there is no evidence of waste, fraud or abuse. The goal of the competitive bidding process is to ensure that funding is not wasted because an applicant agrees to pay a higher price than is otherwise commercially available. We find no indication in the record that, as a result of these errors, applicants benefited from their mistakes or that any service provider was harmed. Specifically, there is no evidence in the record that other bids were not considered because these applicants did not fully comply with our competitive bidding rules. We find that the policy underlying these rules, therefore, was not compromised due to Petitioners' errors. In fact, those Petitioners with multi-year contracts complied with our competitive bidding rules when their requests for service were initially posted. Furthermore, we find that several of these Petitioners, while not waiting the full 28 days before entering into an agreement, only missed the 28-day deadline by a minimal number of days (i.e., one to three days) and therefore their requests for discounted services were subject to competitive bidding for a meaningful period of time. While we emphasize that our competitive bidding rules are important to ensure a fair bidding process, we find that denying these Petitioners requests for funding would create undue hardship and prevent these potentially otherwise eligible schools and libraries from receiving E-rate funding. We therefore find that good cause exists to grant Petitioners a waiver of section 54.504(b)(4) of our rules.<sup>91</sup>

Similar circumstances prevail here. In each case, the contract was executed no more than one to three days in advance of the allowable contract date, meaning that the Form 470 was

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<sup>91</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Requests for Review of the Decision of the Universal Service Administrator by Aberdeen School District, Aberdeen, Washington, FCC07-63, 22 FCC Rcd 8757 (2007), at ¶ 9 (“*Aberdeen*”).



available for a meaningful period of time. Specifically, with respect to FRNs 1758853, 1759054, and 1758970, the allowable contract date was February 7, 2007. As indicated above, Rio Linda executed the CalNet II contract on February 4, 2007. SBC signed on February 6, 2007, and the authorized state official approved the contract on February 7, 2007,<sup>92</sup> which was the allowable contract date and the same date that the FCC Form 471 filings were submitted and certified.

Therefore, to the extent that a violation occurred at all, there was no material impact on the competitive process. The contracts were signed maximum of three days early. There were no other bidders. And, Rio Linda received no complaints or bid protests in connection with the procurement process.

Similarly, with respect to FRN 1618069 and 1636144, the COMAD appears primarily to be based on SLD's conclusion the fact that the Rio Linda's Request for Proposals released on January 10, 2007 carried a due date for responses of February 5, 2007. The Form 471 for this funding request, however, was not filed until the allowable contract date of February 7, 2007. While the due date for responses appears therefore to have been scheduled two days early, that minor violation produced no material impact on the competitive process. The due date for proposals was only two days early, and the Form 471 was not filed until the allowable contract date. There were no other bidders. And, Rio Linda received no complaints or bid protests in connection with the procurement process.

Rio Linda believes, in any event, that the COMAD is in error with respect to FRN 1636144 for an additional reason. Because the FY2007 Form 470 did not encompass BMIC services, that portion of the Marketware proposal was ultimately characterized and processed as

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<sup>92</sup> *Id.*; see also Exhibit 4.

an amendment to the FY2006 BMIC contract, which was also with Marketware. Thus, it appears that the allowable contract date for the FY2007 Form 470 is irrelevant to that funding request.

Since the announcement of Aberdeen, the Bureau has repeatedly found a waiver of this rule justified in such circumstances. For example, the Bureau has acknowledged that, “the Commission has granted waivers in situations where applicants mistakenly signed their contracts or certified their FCC Forms 471 a few days before the allowable contract date.”<sup>93</sup> Explaining the basis for this finding, the Bureau stated that, “[c]onsistent with the *Aberdeen School District Order*, we find that while not waiting the full 28 days before ending the bidding period, the applicant only missed the 28-day deadline by a minimal number of days (*i.e.*, one to three days) and therefore gave all potential vendors adequate time to prepare and submit bids.”<sup>94</sup>

The Commission should make a similar finding here. In this case, the allowable contract date violations, if any, stemmed from Rio Linda’s inadvertent misunderstanding of the applicability of the Commission’s rule in cases where either there was only one bidder, or there were no bidders. The violations were all of three days or less, and had no material impact on the competitive bidding process. Further, as described above, the COMAD would cause tremendous harm to TRUSD’s educational mission, to the detriment of its students. Such a result would disserve the public interest purposes of the Commission’s E-Rate program.

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<sup>93</sup> *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Review and/or Waiver of Decisions of the Universal Service Administrator by Al-Ihsan Academy South Ozone Park, New York, *et al.*, DA 11-1974 (Wir. Comp. Bur. 2011), at ¶ 4 (“*Al-Ihsan*”) (citing numerous earlier precedents); *see also Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Requests for Review and/or Waiver of Decisions of the Universal Service Administrator by Albuquerque School District, *et al.*, Albuquerque, New Mexico, DA 11-672, 26 FCC Rcd 5878 (Wir. Comp. Bur. 2011), at ¶ 2

<sup>94</sup> *Id.* at ¶ 5.

#### **IV. Conclusion**

For the foregoing reasons, TRUSD urges the Commission to grant this Request for Review, vacate the COMADs, and direct USAC to cease all efforts to recover from TRUSD funding disbursed under the Funding Requests at issue in this matter.

Respectfully submitted,



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Rob L. Ball, *RSBA*  
Associate Superintendent-Business Support Services  
Twin Rivers Unified School district  
3222 Winona Way  
North Highlands, California 95660

February 8, 2013